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No. 92-612

In the Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE MACKIN, ET AL., PETITIONERS

v.

CITY OF BOSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that the Boston Fire Department should not be released from the terms of a remedial decree requiring race-conscious hiring practices, because the Department had not met the terms of the decree.

2. Whether the court of appeals erred in concluding that the decree is narrowly tailored to serve a compelling state interest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 969 F.2d 1273. The orders of the district court (Pet. App. 18a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1992. The petition for a writ of certiorari was filed on October 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are 35 white applicants for the position of firefighter in the City of Boston. They brought this action to challenge the continued validity of a remedial decree governing the hiring processes of respondent Boston Fire Department, claiming that the decree and the Department's hiring practices under it discriminated against them on the basis of their race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. The district court concluded that the decree was lawful, and that its remedial purposes had not yet been achieved. Accordingly, it granted summary judgment against petitioners. The court of appeals affirmed. Pet. App. 1a-15a.

1. a. In 1972, the Boston Chapter of the NAACP filed suit on behalf of black and Spanish-surnamed individuals against the City of Boston, its Fire Commissioner, and Massachusetts Civil Service officials, alleging that the hiring practices of fire departments throughout the Commonwealth of Massachusetts discriminated against minorities in violation of Title VII, the Fourteenth Amendment, and 42 U.S.C. 1981 and 1983. Pet. App. 4a, 21a-22a. In 1973, the United States filed a similar action, alleging that the Boston Fire Department impermissibly used an entry-level examination that had an unlawful adverse impact on minority applicants. *Ibid.* The district court consolidated the two actions. *Id.* at 4a.

Following trial, the district court concluded that the defendants, including the Boston Fire Department, unlawfully discriminated against black and Spanish-surnamed applicants by requiring them to take "a non-job related examination which ha[d] an

adverse racial impact on blacks and Spanish-surnamed persons." *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F. Supp. 507, 519 (D. Mass. 1974). The district court entered a remedial decree enjoining any further use of eligibility lists based upon such examinations, ordering the Commonwealth to develop a nondiscriminatory job-related entry-level examination, and requiring that qualified black and Spanish-surnamed applicants receive preferential certification.[1] The decree required a one-to-one certification ratio (*i.e.*, one minority candidate for each non-minority candidate)[2] for applicants to the Commonwealth's fire departments, and provided that those procedures would remain in effect for each fire department subject to the decree until it achieved a "complement of minorities commensurate with the percentage of minorities within the community." *Id.* at 523.[3]

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[1] The remedial decree, and the consent decrees that were entered in order to effectuate it, are reprinted in the court of appeals appendix. See C.A. App. 99-106. Like the court of appeals, we will focus herein on the remedial decree, because its terms are the object of petitioners' complaints. See Pet. App. 5a.

[2] Not all jurisdictions subject to the decree were required to impose a one-to-one certification ratio. Rather, the certification ratio for each jurisdiction depended on the degree of the disparity between the minority representation in a city's fire department and the community.

[3] The decree preserved, however, the practice of giving preferential hiring status to applicants who are veterans, relatives of deceased or disabled firefighters, or unemployed firefighters who have been laid off from a fire department in the region. Those preferences generally reflect the requirements of state law. See Mass. Gen. Laws Ann. ch. 31, §§ 26, 40 (West 1983 & Supp. 1992).

b. The court of appeals affirmed, holding that the remedy imposed by the district court was not unlawful. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1027 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975). The court agreed with the district court's finding of discrimination in hiring, and approved the race-conscious relief ordered as a remedy because it went "no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities," and was "carefully limited in extent and duration." *Ibid.* The court of appeals noted that the "decree remains in force, for each local fire department, until that department attains sufficient minority fire fighters to have a percentage on the force approximately equal to the percentage of minorities in the locality." *Ibid.*[4]

2. Petitioners filed the present action in September 1989.[5] They alleged primarily that the Boston Fire Department had complied with the decree by achieving statistical parity between the percentage of minority firefighters and the percentage of minorities in the Boston population, and should not remain bound to follow the race-conscious hiring practices mandated

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[4] An interim consent decree approved and entered by the district court in 1975 provided that no fire department may be exempted until "the percentage of post-probationary minority uniform personnel equals the percentage of minorities in the city or town served by said department." C.A. App. 106.

[5] The amended complaint named as defendants the City of Boston, its mayor, and certain individuals responsible for administering the personnel affairs of the Department. The United States later filed a motion to consolidate petitioners' action with the *Beecher* litigation. The district court granted that motion on August 28, 1990. C.A. App. 3.

by the decree.[6] Petitioners also claimed that the current written entry-level examination used by the Department is job-related and has no adverse impact on minorities. Pet. App. 5a-6a, 23a-24a, 29a. Finally, petitioners claimed that the decree was unlawful because it caused them to be denied employment solely on the basis of their race. *Id.* at 4a-5a, 20a.

On cross-motions for summary judgment, the district court concluded that the remedial goals of the decree had not been met, and accordingly refused to release the Department from the decree. Pet. App. 30a. The court rejected petitioners' claim that the relevant statistics for determining whether the decree's goal of work force parity had been reached were 1970 population figures.[7] According to the 1980 federal census, the Department has "not reached parity within the terms of the decree," because the minority population in Boston exceeded the current percentage of minorities in the Department. *Id.* at 24a.

The district court concluded (Pet. App. 25a-29a) that the imposition of race-conscious relief in 1974 was constitutionally permissible under the strict scrutiny mandated by this Court's decisions. See, *e.g.*, *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *United States* v. *Paradise*, 480 U.S. 149

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[6] At present, 34 of the 58 departments originally subject to the 1974 decree have been released from its terms because the percentage of minorities in those departments became commensurate with the percentage of minorities in the respective communities since the decree was entered. Pet. App. 5a.

[7] At the time this action was filed, 23.6% of the Department's firefighters were minorities, a figure that exceeded the percentage of minorities in the general population of Boston when the decree was filed in 1974. Pet. App. 24a.

(1987); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986). The 1974 finding of unlawful discrimination provided the predicate for remedial action (Pet. App. 26a), and the decree was narrowly tailored since "[n]o whites have been discharged or demoted under the terms of the decree" and "the plan is a temporary measure * * * not intended to maintain racial balance." *Id.* at 29a, quoting *United Steelworkers* v. *Weber*, 443 U.S. 193, 208 (1979).[8]

Petitioners filed a motion for reconsideration. Pet. App. 18a. Relying for the first time on data from the 1980 census, petitioners argued that because Massachusetts law requires firefighters to be at least 19 years old, the district court should have compared the percentage of minority firefighters in the Department (23.6%) with the percentage of minorities in the Boston population over the age of 18 (23.6%) according to that census. Under that measure, petitioners argued, there was no disparity justifying continued imposition of the race-conscious remedial decree. Pet. App. 13a-14a, 18a-19a.

The district court denied petitioners' motion for reconsideration. The court noted that 1990 census data, the most current statistical data available, showed that minorities comprise 29.72% of Boston's population who were 18 years old or older. Using the most current statistics available, the district court

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[8] The court also concluded that "[the] dispute among the parties as to whether the examination is valid is not material to this case * * * [because the] order does not expire merely because a validated examination is given. No department can be exempted until it reaches parity with the minority population." Pet. App. 28a.

concluded that the Department had failed to meet the requirements of the decree. Pet. App. 19a.

3. The court of appeals affirmed. Pet. App. 1a-15a. It agreed that the requirements of the 1974 remedial decree had not been met, and therefore refused to exempt the Department from its terms. *Id.* at 8a-10a, 14a-15a.

First, the court rejected petitioners' argument that the relevant reference for determining whether parity had been achieved was the number of minorities in Boston's population when the decree was entered in 1974. That argument "tortures the language of the decree, disregards the parties' consistent practice while operating under the decree, and defies common sense." Pet. App. 8a. The language of the decree is naturally read to refer to current population statistics. Moreover, since the decree was entered, the determination whether fire departments should be exempted from its terms had "universally been guided by reference to contemporaneous population statistics." *Id.* at 9a.

The court also held that the district court did not abuse its discretion in denying petitioners' motion for reconsideration based on a belated claim that the 1980 census figures demonstrate that parity had been achieved. Pet. App. 13a-15a. The 1980 census figures upon which petitioners relied in their motion for reconsideration were "available to them all along," and petitioners "offered no viable excuse" for their failure to cite those statistics earlier. *Id.* at 14a-15a. The court of appeals also noted that petitioners' claim that the 1980 figures demonstrate that parity had been achieved was without merit. *Ibid.* Because state law requires applicants to be at least 19 years of age to qualify for appointment as a firefighter, "[t]he most

pertinent 'labor pool' information that can be gleaned from the 1980 census figures is the head count of black and Spanish-surnamed individuals who were ten years of age, or older, in 1980," since those are the minorities who in 1989 would have been old enough to apply for a position in the Department. *Ibid.* Those figures did not establish, however, that the decree's goal of parity had been achieved.[9]

The court of appeals also rejected petitioners' challenge to the lawfulness of the district court's 1974 remedial decree. The court of appeals first noted that it had determined the decree to be constitutionally permissible in 1974. See *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d at 1027. Applying the strict scrutiny mandated by this Court's recent decisions, the court of appeals reaffirmed its earlier conclusion that the decree was narrowly tailored to remedy prior unlawful discrimination. Pet. App. 11a-13a. A number of factors—including the fact that the decree gives a preference only to qualified candidates, does not require the appointment of minority candidates, does not override statutory preferences mandated by state law, does not disturb the legitimate expectations of white applicants, and is limited in duration—indicate that the decree is sufficiently tailored. *Id.* at 12a-13a.[10]

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[9] According to the 1980 census, 26.64% of Boston's population were minorities who were also eligible by age to be firefighters in 1989, C.A. App. 272, a figure that exceeded the percentage of minorities in the Department. Pet. App. 15a, 18a.

[10] The court of appeals also agreed with the district court's conclusion that petitioners' claim that the Department had

ARGUMENT

1. Petitioners contend (Pet. 6-11) that the court of appeals erred in concluding that the Boston Fire Department has not satisfied the objectives of the remedial decree. According to petitioners, work force parity within the contemplation of the decree has been achieved.

a. Petitioners first argue (Pet. 6, 10) that the decree should be interpreted to require only that the percentage of minorities in the Department equal the percentage of minorities in the Boston population when the decree was entered in 1974. The court of appeals correctly concluded that petitioners' interpretation of the decree is without merit.

As the court of appeals explained, the "natura[l] read[ing]" of the decree's language as well as the "immutable, decade-old pattern of past practice" of the parties establish that parity is to be measured in terms of "contemporaneous population figures." Pet. App. 8a, 9a. In contrast, petitioners have "presented no direct evidence that the purpose of the 1974 decree was to exempt [the Department when it] reache[s] parity with the * * * 1974 population

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developed an entry-level examination having no adverse impact on minorities was beside the point. Pet. App. 10a. The court explained, "[e]ven a cursory reading [of the decree] makes it crystal clear that validated examinations are not an end in themselves," but a means of achieving the decree's goal of eliminating the effects of past discrimination. *Ibid.* Accordingly, "[e]ven if the examination was non-discriminatory, as [petitioners] alleged, the paucity of minority representation in the Department * * * negat[es] any argument that the purposes of the decree ha[ve] been achieved." *Id.* at 10a n.3.

statistics." *Id.* at 24a.[11] Accordingly, the court of appeals correctly rejected petitioners' fact-specific claim that compliance with the decree should be measured by reference to 1974 population statistics.

b. Petitioners also contend (Pet. 7-8) that work force parity has been achieved within the meaning of the decree because the percentage of minorities in the Department in 1989 (23.6%) was equal to the percentage of minorities over the age of 18 in the Boston population as of 1980 (23.6%). The court of appeals correctly rejected that fact-bound claim as well.

Census data reflecting the percentage of minorities in Boston over the age of 18 in 1980 at best would parallel the percentage of minorities in 1989, nine years later, who were at least 27 years old. As the court of appeals explained, because state law requires firefighters to be at least 19 years of age (see Mass. Gen. Laws Ann. ch. 31 § 58 (West 1983 & Supp. 1992)), "[t]he most pertinent 'labor pool' information that can be gleaned from the 1980 census figures" is the percentage of minorities who were ten years of age or older in 1980—a number that would give some rough indication of the number of black and Spanish-surnamed individuals who in 1989 were old enough to be considered for a firefighter position. Pet. App. 14a. Under that analysis, the percentage of eligible minorities in 1989 was 26.64%, which was roughly 3% greater than the percentage of minorities in the Department. *Ibid.*; C.A. App. 272. The court of appeals thus ruled

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[11] Moreover, reliance on outdated 20-year-old census data makes little sense, since current statistics are available and a comparison of 1989 work force statistics with 1974 population statistics would not indicate whether the effects of the Department's prior unlawful discrimination had been cured. Pet. App. 9a-10a.

that, even under the 1980 census figures that were the basis for petitioners' belated argument in their motion for reconsideration, the Department had failed to meet the decree's goal of work force parity.[12]

At bottom, petitioners' quarrel is with the court of appeals' interpretation of a remedial decree that is unique to this case. Petitioners cite no cases raising similar issues, much less any that are in conflict with the decision below, and further review is accordingly unwarranted.

2. Petitioners contend (Pet. 10, 12-15) that the decree unlawfully deprived them of employment on the basis of race. Specifically, petitioners claim that the decree is not narrowly tailored to remedy identified past discrimination, as required by this Court's decisions. See *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *United States* v. *Paradise*, 480

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[12] Petitioners also argue (Pet. 10-11, 13-15) that the court of appeals erred in refusing to exempt the Department from the decree because its current entry-level examination has no adverse impact. Because the decree mandates that the prior discrimination be remedied by affording a hiring preference to minorities, the court of appeals concluded that the use of a bias-free examination was not sufficient to require dissolution of the decree. Pet. App. 10a & n.3.

Moreover, it is a disputed issue of fact whether the examination at issue is valid. The United States argued in the district court that the examination had not been properly validated. See C.A. App. 83-86. That did not pose a barrier to granting summary judgment for respondents, however, because the courts below concluded that petitioners' claims were without merit even if they were correct as to the validity of the examination. Pet. App. 10a n.3. In contrast, petitioners plainly were not entitled to summary judgment based on the asserted validity of the examination, since that was a disputed issue of fact.

U.S. 149 (1987); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

The court of appeals agreed, however, that strict scrutiny is necessary in these circumstances. Pet. App. 6a. Under that analysis, a state or local government may not afford race-conscious relief unless it is supported by a compelling state interest and is narrowly tailored to further that interest. *Ibid.* Petitioners' claim therefore reduces to a dispute over the application of settled legal analysis to the facts of this case.

The court of appeals rejected petitioners' claim that the Department no longer had any basis for adhering to the decree because "tremendous strides" (Pet. 14) have been taken—particularly the development of an unbiased examination—since the decree was entered in 1974. In light of the prior finding of identified discrimination, the court of appeals correctly determined that the Department had a compelling state interest in taking action to remedy its effects. See *Croson*, 488 U.S. at 498-505; *United States* v. *Paradise*, 480 U.S. at 167 (plurality opinion).[13]

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[13] Petitioners also argue (Pet. 14) that because the Department has "made tremendous strides in remedying the past effects of any discrimination that may have occurred prior to 1974, there is no 'strong' or 'firm' basis in the evidence of prior discrimination." As the court of appeals noted, however, petitioners did "not argue that the original finding of discrimination was flawed." Pet. App. 7a. Petitioners cannot credibly claim that the Department lacked a compelling interest in complying with a remedial decree imposed on it after a trial on the merits, at which it was found to have unlawfully discriminated against minorities on the basis of their race.

In determining that the decree was narrowly tailored to remedy identified past discrimination, the court of appeals first relied (Pet. App. 11a) on its 1974 conclusion that the decree was "carefully limited in extent and duration," and went "no further than to eliminate the lingering effects" of the past discrimination. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d at 1027. The court of appeals went on to analyze (Pet. App. 11a-13a) factors identified by this Court as relevant to whether a remedy is sufficiently narrowly tailored, and concluded that its 1974 conclusion was correct. See *United States* v. *Paradise*, 480 U.S. at 171 (plurality opinion). In particular, the court concluded that the decree gave an advantage only to qualified minorities, and did not require the hiring of anyone. Moreover, the decree maintained Massachusetts' statutory hiring preference for veterans, the children of disabled firefighters, and others. The court of appeals noted that the decree did not upset any legitimate expectation of being hired on the part of petitioners. "The record shows that, when [petitioners] sought appointment to the Department, there were many white candidates with statutory preferences and perfect test scores, and few firefighters' vacancies." Pet. App. 13a. Thus, the court of appeals concluded that the race-conscious hiring practices mandated by the decree passed strict scrutiny "with flying colors." *Id.* at 12a.

Petitioners' disagreement with the court of appeals is based on that court's application of strict scrutiny analysis to the facts of this case. Petitioners cite no authority mandating a different analysis, and do not claim that the decision below conflicts with the deci-

sion of any other court of appeals.[14] This Court's review is therefore unwarranted.

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[14] The *en banc* Seventh Circuit currently has pending before it two consolidated cases presenting challenges to race-conscious promotion practices (specifically a 25% minority promotion goal for the engineer rank) of the Chicago Fire Department, and to the promotion to captain rank of two minority firefighters who failed to reach the cut-off score on a promotion examination. *Billish* v. *City of Chicago and Chicago Firefighters Union Local No. 2* v. *Daley*, Nos. 90-1650 and 90-2182. The defendants in those cases claim that a consent decree between the City of Chicago and the United States (in which the City did not admit any violation of Title VII) required the practices at issue, and that the promotion of the two firefighters with test scores below the cut-off was necessary to avoid a prospective violation of Title VII. The cases are on appeal from the district court's grant of summary judgment for the defendants. The United States filed a brief in those cases as *amicus curiae*, arguing that strict scrutiny applied; that the consent decree did not require the practices at issue and did not shield the City's actions from challenge; and that material issues of fact remained concerning whether the Department's race-conscious practices were sufficiently narrowly tailored. Inasmuch as the Seventh Circuit cases concern interpretation of a consent decree rather than a remedial decree, and promotion practices rather than hiring practices, that litigation presents issues distinct from those in the present case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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